Supreme Court, U.S.
FILED
JUN 26 2000
OFFICE OF THE CLERK

(1)

No. 99-2072

IN THE

Supreme Court of the United States

HEALY TIBBITTS BUILDERS, INC.,

Petitioner,

—v.—

ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WARREN L. SIMPSON, JR.
Counsel of Record
WEBER GOLDSTEIN GREENBERG & GALLAGHER, LLP
One Evertrust Plaza
Jersey City, New Jersey 07302
(201) 915-0909

Attorneys for Petitioner

61pp

QUESTION PRESENTED

The Ninth Circuit Court of Appeals has interpreted § 921 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (the Act), as permitting the Benefits Review Board (Board) to conduct appellate review when a record compiled by an administrative law judge does not exist. The Seventh Circuit Court of Appeals has reached the opposite conclusion by noting that Congress strictly limited the Board's scope of authority via § 921(b)(3) which makes the existence of such a record mandatory.

Query: Does the present structure of the Act permit Board review without a record?

LIST OF PARTIES AND DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Petitioner Healy Tibbitts Builders, Inc., is a wholly-owned subsidiary of Weeks Marine, Inc. Both corporations are privately held. There is no public parent corporation or non-wholly-owned subsidiary of Petitioner Healy Tibbitts Builders, Inc.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PLAIN STATUTORY LANGUAGE	4
THE NINTH CIRCUIT'S DECISION IS AT ODDS WITH THE STRUCTURE OF THE ACT	7

PAGE

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF A DIFFERENT CIRCUIT COURT OF APPEAL 11

CONCLUSION 12

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 18a

APPENDIX D 27a

APPENDIX E 29a

APPENDIX F 31a

APPENDIX G 33a

APPENDIX H 38a

APPENDIX I 40a

TABLE OF AUTHORITIES

Cases	PAGE
Crowell v. Benson, 285 U.S. 22 (1932)	12
Demarest v. Manspeaker, 498 U.S. 184 (1991)	7
Director, Office of Workers Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995)	2, 3, 5, 8, 10
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992)	7
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977)	7
Pearce v. Director, Office of Workers' Compensation Programs, 647 F.2d 716 (7th Cir. 1981)	4
Presley v. Tinsley Maintenance Svce., 529 F.2d 433 (5th Cir. 1976)	6
Pyro Mining Co. v. Slaton, 879 F.2d 187 (6th Cir. 1989)	10
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	7
Champagne v. Maine Iron Works, Inc., 20 BRBS 84 (BRB 1987)	9
Grandy v. Vinnell, 14 BRBS 504 (BRB 1981)	9
Main v. Brady Hamilton Stevedoring Co., 18 BRBS 129 (BRB 1986)	9

PAGE

Statutes and Federal Regulations

33 U.S.C. § 907 3

33 U.S.C. § 919(c) 4

33 U.S.C. § 919(d) 5, 8, 9

33 U.S.C. § 921(b)(3) 3, 4, 6, 10

33 U.S.C. § 921(b)(4) 6

33 U.S.C. § 921(c) 2

28 U.S.C. § 1254 2

5 U.S.C. § 551 (5), (7) 9

5 U.S.C. § 554 3

20 C.F.R. § 802.301(a) 5, 9

Other Authorities

H.R. Rep. No. 92-11441, 92d Cong., 2d Sess. (1972) 8

S. Rep. No. 92-1125, 92nd Cong., 2d Sess. (1972) 8

PETITION FOR WRIT OF CERTIORARI

Petitioner, Healy Tibbitts Builders, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals Order denying Petitioner's petition for panel rehearing is reprinted as Appendix A. It has not been officially reported.

The opinion of the court of appeals, reprinted as Appendix B, is officially reported at 201 F.3d 1090 (9th Cir. 2000).

The opinion of the Benefits Review Board, reprinted as Appendix C, has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix D, has not been officially reported.

The Order of the United States Department of Labor, Office of Administrative Law Judges, reprinted as Appendix E, has not been officially reported.

The Compensation Order/Award of Attorney Fees on Reconsideration, reprinted as Appendix F, has not been officially reported.

The Compensation Order/Award of Attorney Fees, reprinted as Appendix G, has not been officially reported.

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit which was dated and entered on February 2, 2000. On March 28, 2000, a petition for panel rehearing was denied by the Court of Appeals for the Ninth Circuit.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 33 U.S.C. § 921(c).

STATUTES INVOLVED

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 919 and 921 (Appendix H; Appendix I).

STATEMENT OF THE CASE

Claims filed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (the Act), can, in the event of persistent dispute, travel through a multi-level agency process before reaching a circuit court of appeal that begins with basic claim administration performed at the Office of Workers' Compensation Programs (OWCP), moves to initial adjudication at the Office of Administrative Law Judges (OALJ), and terminates at the Benefits Review Board (Board) with appellate review of OALJ decisions. *See, Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Company*, 514 U.S. 122 (1995). The scope of OWCP authority following the 1972 amendments to the Act has previously been defined by this Court as "limited" to supervising, administering, and rule-making; this Court has clearly noted that adjudicatory responsibility was removed from the OWCP (or Director, OWCP) in

1972. *Id.* Board authority has been strictly defined by the statute which created said Board:

> (3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from *decisions* with respect to claims. . . . The Board's orders shall be based upon the *hearing record*. The findings of fact in the *decision* under review by the Board shall be conclusive if supported by substantial evidence *in the record* considered as a whole.

33 U.S.C. § 921(b)(3) (emphasis added).

This case addresses the narrow question of whether the Act empowers the Board to exercise its statutorily-created review power in the absence of a "decision" and/or a "record".

Respondent Cabral was involved in a work-related accident on September 26, 1994 while in the employ of Petitioner. Said injury resulted in a claim for benefits pursuant to the Act which was initially administered at the OWCP; OWCP proceedings terminated on April 17, 1995 when Respondent Cabral requested initial adjudication at the OALJ.

Following an administrative hearing conducted in accordance with the Act and the Administrative Procedure Act (APA), 5 U.S.C. § 554, a decision was issued awarding limited medical benefits pursuant to 33 U.S.C. § 907. Respondent Cabral's attorney then submitted a fee request for services rendered at the OWCP.

On December 6, 1996, the District Director issued a Compensation Order/Award of Attorney Fees for services rendered at the OWCP. On December 13, 1996, a motion for reconsideration was submitted by Petitioner and on

December 24, 1996, a second Compensation Order/Award of Attorney Fees was issued. On January 2, 1997, Petitioner submitted a request for initial adjudication at the OALJ pursuant to 33 U.S.C. § 919(c) that was subsequently denied by the OALJ because of a perceived lack of authority to "review" discretionary acts of district directors; denied by the Board on the theory that disputes over attorney's fee awards are typically not within the adjudicatory power of the OALJ but rather directly appealable to the Board; and, denied by the Ninth Circuit Court of Appeals who held that "[n]ot all decision-making by the [OWCP] is subject to a hearing before the OALJ. Review of such decisions is, therefore, properly made by the Board."

In so concluding, the Ninth Circuit ignored the fact that Board review in those situations would proceed without a record, *i.e.*, would proceed without what Congress empowered the Board to review. Moreover, the Ninth Circuit declined to follow the Seventh Circuit's holding in *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981), wherein the presence of an OALJ record was deemed a vital condition precedent to the exercise of Board review power.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PLAIN STATUTORY LANGUAGE.

Any dispute over Board authority must begin with a review of pertinent statutory language which can be found at 33 U.S.C. § 921(b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact

> taken by any party in interest from *decisions* with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the *hearing record*. The findings of fact in the *decision* under review by the Board shall be conclusive if supported by substantial evidence in the *record* considered as a whole.

33 U.S.C. § 921(b)(3) (emphasis added).

Said language clearly presupposes the existence of a "substantial question of law or fact", the existence of a "decision", and the existence of a "hearing record" before the Board can exercise its review power. Moreover, that Congress said what it meant and meant what it said when defining the Board's scope of authority is further expressed in the Board's governing regulations which confirm the required existence of a "decision" and a "record" prior to review and which indicates that only evidence which is a part of the "record developed at the hearing before the administrative law judge" can be considered by the Board. 20 C.F.R. § 802.301(a). In short, there is no expression of legislative intent which suggests much less states that Board review can be *de novo* or that Board review can proceed without a "record" or a "decision".

Section 919(d) of the Act requires that hearings held pursuant thereto must be performed in accordance with the APA in front of a hearing examiner (administrative law judge). Most importantly, § 919(d) makes clear that district directors have no authority to conduct hearings or adjudicate. 33 U.S.C. § 919(d); *see also*, *Newport News*, *supra*. This total absence of authority to conduct hearings, when juxtaposed with the imposition of mandatory APA requirements, renders district directors unqualified to create a "hearing record" or issue a "decision". In framing

Board authority in the fashion it did therefore, Congress clearly expressed an intent to permit Board review only from "decisions" issued by administrative law judges that were based on the "hearing record". Were this not the case, Congress certainly would have avoided repeatedly using the critical terms "record", "hearing record", and "decision". There is no ambiguity in the aforecited language; in fact, there is extraordinary clarity as noted by the Seventh Circuit:

> [T]he Board should have refused to hear the appeal and should have remanded it to the Chief Administrative Law Judge for further appropriate action as allowed by 33 U.S.C. Section 921(b)(4) quoted above, because the Board only had authority to review a "hearing record" and there was no such record before it. In short, there was nothing for the Board to review, as it had no authority to consider or review the evidence that had been gathered by the deputy commissioner, or his order, nor to substitute its views for those required to have been, but were not, set forth in an opinion of an administrative law judge.

Pearce, 647 F.2d at 724; *see also Presley v. Tinsley Maintenance Svce.*, 529 F.2d 433, 436 (5th Cir. 1976).

Neither the Ninth Circuit nor the Director has attempted to base their position regarding the propriety of "direct appeals" on the language of the Act or its regulations. While the Ninth Circuit mentions § 921(b)(3) and seems to infer that § 921(b)(4) somehow renders its language ambiguous, their rationale is unexpressed and incomplete. Most importantly, however, the Ninth Circuit and the Director violate the most basic rule of statutory interpretation by engaging in a theoretical discussion of public policy and legislative intent when, in fact, the statute

is clear on its face. "When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished". *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). This Court should reject the Ninth Circuit's tortured analysis of § 921(b)(3) in favor of the clear statutory language.

THE NINTH CIRCUIT'S DECISION IS AT ODDS WITH THE STRUCTURE OF THE ACT.

The Act is a federal workers' compensation statute enacted by Congress in response to this Court's opinion that state compensation laws could not constitutionally reach injuries which occurred upon the navigable waters. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). The Act was largely revised by Congress in 1972 in an attempt to reconcile the competing interests within the maritime industry and to produce a fair compensation scheme for all participants. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

As originally enacted, the Act vested both administrative and adjudicatory functions in a single entity—the Director, OWCP. All day-to-day contact with injured workers and their employers/insurance carriers from the standpoint of claims-administration was handled exclusively by the Director and/or his designated deputy commissioners; all *de novo* fact-finding and subsequent adjudication/decision-making was also in the exclusive realm of deputy commissioners.

In 1972, Congress decisively terminated this dual administrator/adjudicator role by removing all adjudicatory power from deputy commissioners because the pre-

1972 dispute resolution process "[failed] to keep separate the functions of administering the program and sitting in judgment on the hearings." S. Rep. No. 92-1125 p. 13, 92d Cong., 2d Sess. (1972). This specific ill is echoed in additional legislative materials:

> H.R. 120006 amends Section 19(d) . . . to make clear that all hearings under the Act are to be conducted in conformity with the Administrative Procedure Act. . . . It is the committee's belief that the administration of the [Act] has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. Moreover, with the new responsibilities that will evolve upon the Secretary with the passage of this bill it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for the purposes of the disputes brought under this statute.

H.R. Rep. No. 92-11441, 92d Cong., 2d Sess. (1972).

This Court has confirmed the deputy commissioners' total loss of adjudicatory authority in 1972 and the modification of their role to one which is solely administrative, supervisory, and rule-making in nature. *See Newport News, supra.*

To fill this adjudicatory void, Congress inserted 33 U.S.C. § 919(d) and made mandatory the use of administrative law judges for all hearings. Further, Congress required strict application of the APA to all adjudicatory proceedings conducted under the Act; the APA's definition of adjudication clearly dovetails with congressional intent ("agency process for the formulation of an order") as does the split between rule-making and adjudication

seen in the APA. 5 U.S.C. § 551(5) *and* (7). Section 919 reads as follows:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners (administrative law judges).

33 U.S.C. § 919(d)

Finally, completing the total restructure of administration and adjudication under the Act, Congress created the Board—an appellate review body with specific powers and design as set forth above. *See* 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.301(a).

In restructuring the very essence of how the Act was to be implemented on a day-to-day basis, it is quite clear that Congress consciously created a "structure within a structure" by charging the Director with administrative/rulemaking duties, the OALJ with initial adjudication duties, and the Board with appellate review duties. *See Champagne v. Maine Iron Works, Inc.*, 20 BRBS 84, 85 (BRB 1987) (Board held that Director holds administrative role only, all adjudicatory functions reside in OALJ); *Maine v. Brady Hamilton Stevedore Co.*, 18 BRBS 129, 131 (BRB 1986) (same); *Grandy v. Vinnell*, 14 BRBS 504, 507 (BRB 1981) (same).

Notwithstanding this unique legislative clarity, both the Director and the Ninth Circuit reject same in favor of a revised administrative/adjudicatory/appellate structure which can only be interpreted as expanding Board authority beyond § 921(b)(3). To wit: If direct appeals are tenable, the character of Board action changes from appellate review to initial adjudication given the complete absence of either a "record" or a "decision". In short, direct appeals bring the Board beyond its statutory powers by forcing it to create a "record" upon which to base its review or by forcing it to conduct a statutorily-prohibited *de novo* review. This revised structure dilutes congressional intent as manifest through the 1972 amendments, dilutes this Court's findings in *Newport News*, *supra*, and impermissibly legislates from the bench. Finally, the Seventh Circuit has directly rejected the notion that such a revised structure exists and the Sixth Circuit has done similarly on an inferential basis. *See Pyro Mining Co. v. Slaton*, 879 F.2d 187, 190 (6th Cir. 1989) (supporting the right to a hearing at the OALJ because district directors cannot make findings of fact and Board review cannot occur in the absence of OALJ findings of fact).

Direct appeal from district director action to the Board is a fallacy unsupported by statutory language and legislative intent. Moreover, attempts to circumvent the OALJ by labeling certain district director actions as "discretionary" are similarly without merit as once again, such a distinction finds absolutely no support in the Act itself:

> The argument of the respondent that the original application for compensation was adjudicatory in nature and that the application for commutation to a lump sum award was administrative in character and could be disposed of by the deputy commissioner in his discretion without complying with the above cited

> statute and regulations, is unpersuasive. The statute and the regulations make no such distinction. They apply equally to all claims and applications for workmen's compensation benefits which are disputed or controverted. The very fact that the Board considered the appeal in this case refutes and belies respondents' administrative and discretion arguments. In other words, some of the provisions of the statute and regulations were followed by the appeal to the Board, and by its action thereon, but the others with respect to a hearing by an administrative law judge and related proceedings were ignored and violated. If respondents' arguments that the deputy commissioner had the unbridled and absolute discretionary power to finally dispose of the commutation application were followed, his decision should have ended the matter, but of course, it did not.

Pearce, supra, at 726.

Adoption of the Ninth Circuit's holding impermissibly expands the scope of Board authority and destroys the strict constitutional demarcation between adjudication and legislation.

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF A DIFFERENT CIRCUIT COURT OF APPEAL.

The Ninth Circuit has declared that restricting a party's right to be heard at the OALJ by making direct appeals in certain instances mandatory is a "faithful effectuation" of the text and purpose of the Act as amended in 1972. This declaration places the Ninth Circuit in direct conflict with the Seventh Circuit on a narrow issue of statutory interpretation which carries broad implications regarding the

proper roles played by the OWCP, the OALJ, and the Board within the Act's multi-level agency process. While the Seventh Circuit formulates their conclusion on a plain reading of the Act as revised in 1972, the Ninth Circuit posits a theory which draws an unfounded distinction between "adjudicatory" and "discretionary" acts, which ignores the controlling statutory language, and which expands the scope of authority possessed by the Board beyond that which Congress saw fit. To resolve this conflict, to ensure the proper effectuation of legislative intent, and to establish uniformity and harmony in this area of admiralty jurisdiction (*Crowell v. Benson*, 285 U.S. 22 (1932)), certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WARREN L. SIMPSON, JR.
Counsel of Record
WEBER GOLDSTEIN GREENBERG & GALLAGHER, LLP
One Evertrust Plaza, 9th Floor
Jersey City, New Jersey 07302

Attorneys for Petitioner

Dated: June 23, 2000
Jersey City, New Jersey

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEALY TIBBITTS BUILDERS, INC.,	:	No. 98-70552
Petitioner,	:	OWCP No. 15-39103
	:	BRB No. 97-1071
v.	:	
	:	ORDER
ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,	:	
Respondents.	:	

Before: ALDISERT,[1] O'SCANNLAIN, and HAWKINS, *Circuit Judges.*

The panel has voted to deny the petition for panel rehearing. Judges O'Scannlain and Hawkins have voted to deny the petition for rehearing en banc and Judge Aldisert so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

[1] Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

The petition for rehearing and petition for rehearing en banc are denied.

FILED

MAR 28, 2000

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEALY TIBBITTS BUILDERS, INC., *Petitioner*,	: No. 98-70552 : OWCP No. : 15-39103 : BRB No. 97-1071
v.	:
ROBERT CABRAL and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents.*	: OPINION :

On Petition for Review of an Order
of the Benefits Review Board

Submitted December 7, 1999[1]
San Francisco California

Filed February 2, 2000

Before Ruggero J. Aldisert,[2] Diarmuid F. O'Scannlain, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

---

[1] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[2] Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

OPINION

HAWKINS, *Circuit Judge*:

We must decide whether a party challenging an award of attorney's fees under the Longshore Harbor Workers' Compensation Act, 33 U.S.C. § et seq. (The "Act"), has a right to a hearing before the Office of the Administrative Law Judges ("OALJ") when no factual issues are in dispute. Healy Tibbitts Builders, Inc. ("Tibbitts") petitions for review of the order of the Benefits Review Board ("Board") upholding an Administrative Law Judge's ("ALJ's") dismissal of just such a challenge. Because we conclude that the ALJ properly determined it did not have jurisdiction, we deny the petition.

BACKGROUND

On April 5, 1995, an ALJ awarded Robert Cabral ("Cabral") limited medical benefits under section 907 of the Act for an injury sustained while employed at Tibbitts. Additionally, the ALJ directed Cabral's attorney to file a fee application for his reasonably necessary work performed on behalf of the claim.

Cabral's attorney submitted an application requesting $795 in fees for work performed before the District Director from March 20 through April 18, 1995, the date on which Cabral's claims were transferred to the OALJ. On December 6, 1996, the District Director awarded $322.50 in attorney's fees for the work performed before her office. Tibbitts filed a motion for reconsideration, arguing *inter alia* that Cabral's attorney was not the attorney of record until April 12, 1995; therefore, no fee could be awarded for work done prior to that date. The motion also included a "formal request for a hearing on

the matter [before an ALJ], pursuant to 20 C.F.R. § 702.316" should the District Director deny the request for reconsideration.[3]

Tibbitts's motion was denied and the District Director reduced the award of attorney's fees to $309.50, reflecting a minor mathematical error in the initial judgment. On January 2, 1997, Tibbitts formally made a timely request for a hearing before an ALJ on the issue. The District Director, without passing judgment on the validity of the request, transferred the matter of the OALJ.

The Associate Chief ALJ thereafter *sua sponte* dismissed the proceeding on the ground that the OALJ lacked jurisdiction. The Order of Dismissal stated, in relevant part:

> [T]he Benefits Review Board (Board) has held that assessment of attorney's fees by the District Director is a discretionary act and review of such an award is, therefore, properly sought by filing a notice of appeal with the Board as the administrative law judge has no authority to review the adequacy of a fee award for services performed before the District Director.

Tibbitts appealed the decision to the Board, which upheld the ruling of the ALJ.

STANDARD OF REVIEW

We review the decisions of the Board for errors of law and adherence to the substantial evidence standard. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d

---

[3] 20 C.F.R. § 702.316 states in pertinent part: "if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge."

615, 618 (9th Cir. 1999). While no special deference is owed to the Board's interpretation of the Act, *see e.g., Moyle v. Director, OWCP*, 147 F.3d 1116, 1119 (9th Cir. 1998), "considerable weight" is accorded to the construction of the statute supported by the Director. *Id.*; *Force v. Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991).

ANALYSIS

Tibbitts could have secured a hearing before an ALJ in one of two ways. First, the Act could be construed to confer upon the parties an absolute right to a hearing on all contested issues regardless of whether additional fact-finding is required. The Seventh Circuit has held as much, *see Pearce v. Director, OWCP*, 647 F.2d 716, 726 (7th Cir. 1981), while the Fifth Circuit and the Board have rejected such a broad reading. *See Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 784 (5th Cir. 1988); *Tupper v. Teledyne Movable Offshore*, 13 B.R.B.S. 614, 615 n.1 (1981) (declining to follow *Pearce*); *Cooper v. Todd Pacific Shipyards Corp.*, 22 B.R.B.S. 37, 1989 WL 245289 (DOL Ben. Rev. Bd. Jan. 31, 1989). Alternatively, the matter may involve genuinely disputed issues that require an evidentiary and fact-finding hearing. Tibbitts's arguments on both grounds fail.

I. Absolute Right to a Hearing.

[1] The ability of a party to demand a hearing under the Act is set forth in 33 U.S.C. § 919(c), which reads in pertinent part: "The [District Director] shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon."

We hold that section 919(c) does not necessarily require an evidentiary hearing before an ALJ on all contested issues.

Our decision is consonant with the purposes of the Act. In 1972, Congress amended the Act to separate the administrative and adjudicative functions that had previously been performed by deputy commissioners under the direction of the Director of the Office of Workers' Compensation Programs ("OWCP"). *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. Specifically, the 1972 amendments require that:

> All powers, duties, and responsibilities vested by this chapter on October 27, 1982, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 919(d).[4]

[2] Section 919(c), which was not altered by the 1972 amendments, must be read in conjunction with section 919(d). The plain language of section 919(d) indicates that the OALJ's jurisdiction includes only those matters whose determinations were vested in deputy commissioners (now District Directors) "with respect to hearings" prior to 1972. Section 919(d) simply does not pertain to matters for which deputy directors had no authority to hold hearings prior to 1972; therefore, section 919(d) cannot confer an absolute right to a hearing before an ALJ on all contested issues.[5]

---

[4] The 1972 amendments also changed the name of "deputy commissioners" to "District Directors."

[5] Whether a "claim" as used in section 919(c) includes a request for or an objection to the award of attorney's fees has not been addressed by any court. While we need not answer this question,

A similar interpretation has been adopted by the Fifth Circuit. In *Ingalls Shipbuilding Division, Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), *overruled on other grounds sub nom. Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984) (en banc), the court held that the OALJ did not have the authority to approve compromise settlements made under section 908(i)(a) of the Act. The Fifth Circuit relied in part on the inability of deputy commissioners, prior to the 1972 Amendments, to independently approve such settlements; rather, final approval was vested in the Secretary. Section 919(d) of the Act, the court reasoned, could not have transferred the power to approve such settlements from the deputy commissioners to the OALJ because such authority was never fully vested with the commissioners to begin with. *See Ingalls*, 681 F.2d at 289. We find this reasoning not only persuasive but also consistent with the plain meaning of section 919(d). Accordingly, we hold that the Act does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues.[6]

---

we are skeptical that a "claim" includes issues which are ancillary to the underlying claim for disability or death benefits under the Act. Though neither the Act nor its regulations define "claim," the regulations governing attorney's fees at least implicitly make a distinction between a "claim" and the attorney's fees themselves. *See* 20 C.F.R. § 702.132(a) ("Any person seeking a fee for *services performed* on behalf of a claimant with *respect to claims filed under the Act* shall make application therefore . . .") (emphasis added).

[6] The regulations governing the adjudication procedures of the Act also lend support to our holding that not all disputed issues must be resolved by a hearing before an ALJ. The regulations state: "Where there is a genuine dispute of fact . . . which cannot be disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at § 702.331." 20 C.F.R. § 702.301 (emphasis added).

[3] Inasmuch as section 919(d) does not establish an absolute right to a hearing before an ALJ, we turn to the question of whether the OALJ lacks jurisdiction when the matter involves purely legal issues and there is no factual dispute. Such a construction of the Act appears to be consistent with its plain language, the purpose behind the creation of the OALJ, and finds support in the case law and longstanding Board decisions applying the 1972 Amendments.

[4] As noted, the language of Section 919(d) vests the OALJ with the authority to hear matters that were previously decided by the deputy commissioners only "with respect to hearings." The 1972 Amendments did not establish a new right to a hearing. Rather, they simply require that any hearings that a deputy commissioner would have conducted prior to 1972 must now be conducted by an ALJ under the provisions of the Administrative Procedure Act. If the issue presented to the deputy commissioner did not necessitate an evidentiary hearing prior to 1972, then the same matter lies outside the cognizance of the OALJ under section 919(d). Purely legal disputes or those that did not require fact-finding obviously did not necessitate an evidentiary hearing conducted by the deputy commissioner; accordingly, such disputes are not within the jurisdiction of the OALJ.

This construction of section 919(d) is supported by the purpose behind the 1972 Amendments, which was to "make clear that all hearings under . . . [the] Act are to be conducted in conformity with the Administrative Procedure Act (5 U.S.C. § 554) by hearing examiners [i.e. ALJs] qualified under the Act." H.R. Rep. No. 92-1441, at 1452, reprinted in 1972 U.S.C.C.A.N. 4698, 4708; *see also* S. Rep. 92-1125 (same). The concern animating the creation of the OALJ was the "belief that the adminis-

tration of the . . . Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings." *Id.*

As the legislative history makes clear, the Amendments did not confer a new right to a hearing before an ALJ where no hearing would have been necessary before the deputy commissioners. Rather, section 919(d) merely relieved deputy commissioners of the responsibility of holding hearings and transferred those duties to the OALJ along with the requirement that hearings be conducted in accordance with the Administrative Procedure Act. In particular, Congress was concerned that, given the new responsibilities conferred upon the District Directors (the new name for the deputy commissioners) by the 1972 Amendments, it was "extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for the purposes of disputes brought [the Act]." *Id.* The OALJ was created to relieve this concern and ensure more efficient operation of the Act. Nothing more, especially the right to a hearing where none had previously existed, was meant to be read into the Amendments.

[5] This position is also consistent with the long-established views of the Director and with decisions of the Board. Since the 1972 Amendments, which created the Board and the OALJ, both the Director and the Board have consistently taken the position that purely legal issues are not within the jurisdiction of the OALJ. In particular, both bodies have established that disputes as to the adequacy of an award of attorney's fees are within the sole discretion of the District Directors and therefore do not involve any matters that require an evidentiary inquiry.

[6] Such disputes, then, also lie outside of the OALJ's purview. *See, e.g., Ellis v. Blake Constr. Co.*, 8 B.R.B.S. 650, 651 (1978) (when parties have entered into an agreement on a claim, there are not further disputed issues requiring an ALJ hearing and the award of attorney's fees is a discretionary act which is properly reviewed by the Board); *Campbell v. Blake Constr. Co.*, 8 B.R.B.S. 755, 758 (178) (the adjudicatory power of the ALJ under section 919(d) "does not encompass the review of discretionary acts, such as approved or awarded attorneys' fees . . ."); *Lawson v. Atlantic Gulf and Stevedores*, 9 B.R.B.S. 667, 668 (1978) (same); *Mazzella v. United Terminals, Inc.*, 8 B.R.B.S. 755, 758 (1978) (the adjudicatory power of the ALJ under section 919(d) "does not encompass the review of discretionary acts, such as approved or awarded attorneys' fees . . ."); *Lawson v. Atlantic Gulf and Stevedores*, 9 B.R.B.S. 855, 858 (1979) ("Questions of law regarding the application and interpretation of post-award penalty and enforcement provisions of the Act . . . are to be appealed directly to the Benefits Review Board."); *Lonergran v. Ira S. Bushey & Sons, Inc.*, 11 B.R.B.S. 345, 346 (1979) (the proper route for appeal from the deputy commissioner's determination of strictly legal issues is directly to the Board); *Champagne v. Main Iron Works, Inc.*, 20 B.R.B.S. 84, 1987 WL 107383, at * 2 n.1 (DOL Ben.Rev.Bd. March 23, 1987) ("The Board accepts direct appeals from a deputy commissioner only where strictly legal issues or matters within the deputy commissioner's discretion are involved."); *Cooper*, 1989 WL 245289, at *5 n.4 (discretionary acts of a deputy commissioner are only appealable directly to the Board).

The reasoning of the Board and the Director has been approved by at least two courts. *See Oceanic Butler*, 842

F.2d at 784 (holding that the matter in question need not be referred to an ALJ because it involved an "issue of pure law" and there were no "evidentiary questions" in dispute which required a fact-finding hearing); *Lauzon v. Strachan Shipping Co.*, 602 F. Supp. 661, 664 (S.D.Tex. 1985) (where disputed issues were purely legal and no relevant facts needed development by presentation of evidence, resolution by the Deputy Commissioner was not inappropriate despite § 19(d), *aff'd*, 782 F.2d 1217, 1222 (5th Cir. 1985)).

These decisions are grounded in sound policy, especially with respect to a District Director's award of attorney's fees. A dispute as to the adequacy of attorney's fees for work performed before the District Director generally involves either purely legal issues or facts that are uniquely known to the District Director. As the Fifth Circuit noted in *Oceanic Butler*, when purely legal issues are in dispute, referral to an ALJ merely produces "additional delay" and can therefore be "inefficient" and "illogical." *Oceanic Butler*, 842, F.2d at 784. Furthermore, referral of legal disputes to the OALJ does not comport with its central role as a fact-finding body.[7]

As for attorney's fees, the regulations require that the requesting party "shall make application therefor to the

---

[7] That the main purpose of the OALJ is to function as a fact-finding tribunal is not in dispute. Genuine factual disputes at the District Director level are referred to the OALJ. *See* 20 C.F.R. § 702.301. Additionally, the Board is prohibited from conducting a de novo review of an ALJ's decision and may only set it aside if the decision is not "supported by substantial evidence in the record considered as a whole or in accordance with law." 20 C.F.R. § 802.301(a). *See also* 33 U.S.C. § 921 ("The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.") Thus, the only body empowered to make findings of disputed fact is the OALJ.

district director, administrative law judge, Board or court, as the case may be, before whom the services were performed." 20 C.F.R. § 702.132(a) (emphasis added). This procedure is markedly different from the one for establishing liability and compensation on the underlying claim (and therefore further supports the view that a request for attorney's fees does not constitute a "claim" under the Act). The process for determining attorney's fees does not start with an informal conference before the District Director. Rather, it begins with the body before which the attorney requesting fees appeared.

Additionally, the regulations specifically provide that attorney's fees shall be awarded based on qualitative, subjective facts that are uniquely within the knowledge of the body before which the attorney appeared. Section 702.132(a) states that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded." *Id.* While review of the District Director's award is certainly necessary, it is best effectuated through appeal to the Board and not the OALJ, whose task is to make findings of fact and not reasonableness determinations based on considerations about which it has no immediate knowledge.[8]

---

[8] Indeed, it has consistently been the Director's position since the enactment of the 1972 Amendments that District Directors' determinations that are not reviewable by the OALJ may be reviewed by the Board, generally under a deferential abuse of discretion standard. *See, e.g., Loiselle v. Portland Stevedoring Co.*, 2 B.R.B.S. 214, 218-19 (Aug. 29, 1975) (consideration by the deputy commissioner of application for commutation of future benefits does not require a hearing before the ALJ but is reviewed on the record created by the deputy commissioner); *Pearce v. McDonnel Douglas Corp.*,

We understand our position is at odds with the Seventh Circuit's opinion in *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981). In *Pearce*, the court held that the District Director had the plain duty to transfer a case concerning a request to convert periodic compensation payments into a lump-sum award to the OALJ when the claimant had requested a hearing. *See id.* at 724-725.

In reaching this conclusion, the court cited to section 921(b)(3) of the Act, which states that decisions and orders of the Board "shall be based upon the hearing record." 33 U.S.C. § 921(b)(3). According to the *Pearce* court, "this provision assumes that a hearing was had on the claim by an administrative law judge and that a record was made of the hearing . . . ." *Pearce*, 647 F.2d at 725. Therefore, the Board had "no authority to consider or review the evidence that had been gathered by the deputy commissioner" because the Board could only review a "hearing record" and such a record can only be developed in an ALJ proceeding. *See Id.* The Seventh Circuit concluded that the "statute and regulations make no . . . distinction" between requests for hearings on claims that are "adjudicatory" in nature and those that are "administrative" in nature. *Id.* at 726.

The Seventh Circuit appears to be alone in its view; *Pearce* has not been followed or cited favorably by any other court. The Board itself has declined to follow the case outside of the Seventh Circuit. *See Tupper*, 13 B.R.B.S. at 615 n.1 (declining to follow *Pearce* and reiterating the distinction between "strictly legal issues,"

---

5 B.R.B.S. 573, 578 (March 14, 1977) (same); *Marcum v. Director, OWCP*, 12 B.R.B.S. 355, 357 (Board may only set aside a District Director's award of attorney's fees if arbitrary, capricious, or an abuse of discretion); *Story v. Navy Exchange Service Center*, 1999 WL 695530, at *1 (DOL Ben.Rev.Bd., August 6, 1999) (same).

which are appealed directly to the Board, and "disputes involving questions of both law and fact," which are appealable to the OALJ).

The Seventh Circuit's analysis in *Pearce* also appears not to consider section 921(b)(4) in light of the overall statutory structure. *See In re Bonner Mall Partnership*, 2 F.3d 899, 915 (9th Cir. 1993) ("In interpreting statutory language we are not confined to the specific provision at issue but may look to the structure of the law as a whole . . . .") (citation omitted). As was noted, section 919(c) must be read in conjunction with section 919(d), which provides only for the vesting of the District Director's responsibilities which existed prior to 1972 "with respect to hearings."

Not all decision-making by the District Director is subject to a hearing before the ALJ. *See Ingalls Shipbuilding Division*, 681 F.2d at 289. Review of such decisions is, therefore, properly made by the Board. Additionally, as our discussion above indicated, entitling a party to a hearing before an ALJ on all contested issues would waste resources by placing a host of purely legal matters before a tribunal whose purpose is primarily to engage in fact-finding. We are satisfied that the current structure of appeals from a District Director's rulings is a faithful effectuation of the text and purpose of the Act as amended in 1972.

II. Genuinely Disputed Issues Necessitating an Evidentiary Hearing.

[7] An award of attorney's fees may be appealable to the OALJ if the appeal were based on disputed facts that require an evidentiary hearing. The Board held that the instant case did not require an evidentiary hearing before an ALJ. We uphold this decision, as it is supported by

substantial evidence and did not involve an error of law. *See Duhagon*, 169 F.3d at 618 (Board decisions reviewed for errors of law and adherence to substantial evidence standard).

[8] Because an award of attorney's fees is within the District Director's discretion, the only conceivable factual dispute would be over when Cabral's attorney began to perform professional services. The Board has consistently held, however, that the actual date on which an attorney's representation of a claimant is filed with the OWCP has no bearing on whether the requested fee is reasonable in light of the work performed. *See Liggett v. Crescent City Marine Ways & Drydock Co.*, 1997 WL 692212 (DOL Ben.Rev.Bd. Oct. 16, 1997) (en banc); *Grimm v. Director, OWCP*, 4 BLR 1-203 (1981).

[9] The Board accepted the District Director's conclusion that the claimant's attorney adequately explained his representation in this case and that the explanation was incorporated into the District Director's compensation award. In light of Board precedent and the adequate explanation of the work claimant's counsel had performed, we affirm the Board's decision that the award of attorney's fees involved no factual dispute that would require a hearing before an ALJ.

[10] Finally, the Board's finding that Tibbitts did not file an appeal with the Board within the required thirty days after the District Director's ruling became final is supported by the record. *See* 33 U.S.C. § 921(a); 20 CFR § 802.205. Nor does Tibbitts's request for a hearing before an ALJ constitute an appeal to the Board. *See Porter v. Kwajalein Services, Inc.*, 1997 WL 609352, at *2 (DOL Ben.Rev.Bd. Sept. 25, 1997) (holding that a motion to the OALJ requesting that its order be set aside "does not evince an intent to seek Board review

. . . ."), *aff'd on reh'g*, 1998 WL 230203 (DOL Ben.Rev.Bd. Apr. 9, 1998). Tibbitts did file a direct appeal to the Board, but this action was some 120 days after the District Director's order became final. The Board properly dismissed the appeal.

PETITION DENIED.

APPENDIX C

U.S. Department of Labor

Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

BRB No. 97-1071

ROBERT CABRAL *Claimant-Respondent,* v. HEALY TIBBITTS BUILDERS, INCORPORATED *Self-Insured Employer-Petitioner*	NOT PUBLISHED DATE ISSUED: MAR 24 1998 DECISION AND ORDER

Appeal of the Order of Dismissal and Order Denying Employer's Motion for Reconsideration of James Guill, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney Fees and Compensation Order Award of Attorney Fees on Reconsideration of Joyce L. Terry, District Director, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for Claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey for self-insured employer.

Before: HALL, *Chief Administrative Appeals Judge*, SMITH and DOLDER, *Administrative Appeals Judge*.

PER CURIAM:

Employer appeals the Order of Dismissal and Order Denying Employer's Motion for Reconsideration (95-LHC-1763) of Administrative Law judge James Guill, and the Compensation Order Award of Attorney Fees and Compensation Order Award of Attorney Fees on Reconsideration (Case No. 15-39103) of District Director Joyce L. Terry rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3). The amount of an attorney's fee is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel submitted an attorney's fee application to the district director for work performed before the Office of Workers' Compensation Programs (OWCP) between March 20, 1995, and April 18, 1995, requesting a total fee of $795.[1] In her Compensation Order dated

---

[1] Below is a brief synopsis of the procedural history of this case. Claimant, as a result of a back injury sustained while working for employer as a crane operator aboard a crane barge on September 26, 1994, filed claims seeking compensation under both the Jones Act and Longshore Act. With regard to the claim brought under the Jones

December 6, 1996, the district director awarded counsel an attorney's fee of $332.50, representing 4.1 hours of work by counsel at an hourly rate of $150, and 3.8 hours of work by counsel's legal assistant at an hourly rate of $100. In response to employer's motion, the district director issued a Compensation Order on Reconsideration in which she reduced the award by $23 due to a mathematical error.[2]

Employer subsequently filed an LS-18/Pre-Hearing Statement seeking de novo review of the district director's Compensation Orders before the Office of Administrative Law Judges on the grounds that the district director failed to consider its contention that claimant's counsel was not the attorney of record at the OWCP until April 12, 1995, and thus was not entitled to any

---

Act, the United States Court of Appeals for the Ninth Circuit determined that claimant was a land-based worker with only a transitory or sporadic connection to the barge, and thus concluded that claimant was not a seaman entitled to compensation under the Jones Act. *Cabral v. Healy Tibbitts Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997), petition for cert. pending, No. 97-1346. Accordingly, the Ninth Circuit affirmed the district court's decision to grant summary judgment in favor of employer. *Id.* With regard to the claim brought under the Longshore Act, Administrative Law Judge Paul A. Mapes, by Decision and Order issued April 5, 1996, determined that claimant is not entitled to disability benefits on the grounds that claimant failed to show that at any relevant time he was unable to perform the duties of a crane operator. Judge Mapes, however, awarded medical benefits and subsequently issued a Supplemental Decision and Order Awarding Attorney's Fees to claimant's counsel for work performed at the Office of Administrative Law Judge level totaling $3,052.50. Judge Mapes' decisions were not appealed to the Board.

[2] We correct the district director's error in recalculating the fee owed to claimant's counsel, and thus modify her Compensation Order Award of Attorney Fees on Reconsideration to reflect that counsel is awarded $309.50 rather than the $309.00 stated by the district director.

attorney's fee for worked performed prior to that date. In his Order of Dismissal, the administrative law judge rejected employer's request for a hearing, concluding that he does not have subject matter jurisdiction over the district director's attorney's fee award.[3] Employer's motion for reconsideration was subsequently denied by the administrative law judge in his Order dated April 2, 1997.

On appeal, employer challenges the administrative law judge's Order of Dismissal and subsequent denial of its motion for reconsideration, and the district director's Compensation Orders awarding an attorney's fee. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erroneously assumed the employer sought to challenge the adequacy of the contested fee award, when, in actuality, its request for a de novo hearing is premised on the district director's failure to address what it considers a legal/factual issue presented below, i.e., whether/how long claimant's counsel was the attorney of record at the OWCP level. Employer asserts that as the district director is relegated to a purely administrative role, she has no authority to make findings of fact and as employer maintains that the dispute involves a question of fact with regard to the fee awarded by the district director, it has an absolute right to a hearing before the administrative law judge. Consequently, employer requests that the administrative law judge's Orders of Dismissal be vacated and the case be remanded for a formal hearing on the relevant issue as to when claimant's counsel became the counsel of record with the OWCP.

---

[3] The administrative law judge specifically determined that he does not have the authority to review the adequacy of a fee award for services performed before the district director.

Section 28(c) of the Act, 33 U.S.C. § 928(c), and 20 C.F.R. § 702.132 provide that an attorney seeking a fee shall make application to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed. It is therefore well-settled that each adjudicatory level must set the appropriate award of an attorney's fee for the services performed before it. *See generally Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979). Moreover, the Board has held that disputes over attorney's fee awards before the district director are typically not within the adjudicatory power of the administrative law judge, and thus are directly appealable to the Board. *See Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205 (1986).

The Board has enunciated three basic principles regarding whether a district director's action should be reviewed by an administrative law judge or by the Board. *Id.* First, review of discretionary acts of the district director must be undertaken by the Board. *Glenn*, 18 BRBS at 205; *see generally Mazzella v. United Terminals, Inc.*, 8 BRBS 755, *aff'd on recon.*, 9 BRBS 191 (1978). Second, the proper route for appeal of the district director's determination of strictly legal issues is directly to the Board. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting); *Glenn*, 18 BRBS at 205; *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614 (1981); *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979). Finally, when a fee dispute involves questions of fact the case must be referred to an administrative law judge. *Glenn*, 18 BRBS at 205; *Mazzella*, 8 BRBS at 755.

Employer in the instant case states that the relevant issue centers on the district director's failure to consider its argument relating to the date counsel became the attorney of record. *See* Employer's Brief in support of Petition for Review at 2-7. Employer also notes its argument involves a legal/factual determination for which it is entitled to a formal hearing before an administrative law judge. *Id.* Contrary to employer's contentions, it is not entitled to a formal hearing before an administrative law judge with regard to the district director's alleged error in awarding an attorney's fee for work performed at that level.[4] 33 U.S.C. § 928(c); 20 C.F.R. § 702.132; *Revoir*, 12 BRBS at 524; *Owens*, 11 BRBS at 409; *see also Jarrell v. Newport News & Dry Dock Co.*, 19 BRBS 216 (1987); *Glenn*, 18 BRBS at 205. First, the instant case presents, in part, a question over whether the district director properly determined the number of compensable hours, and thus concerns the adequacy of the fee award, which falls within the district director's discretionary authority. In addition, the relevant issue as outlined by employer, i.e., whether the grounds for employer liability under Section 28 are met, involves a legal interpretation.[5] *Glenn*, 18 BRBS at 205. Conse-

---

[4] We further note that employer's reliance upon Sections 702.315 and 702.316, 20 C.F.R. §§ 701.315, 702.316, for the proposition that it has an absolute right to a formal hearing before an administrative law judge upon request, is misplaced since the scope of those provisions concerns the adjudication procedures pertaining to claimant's rights to compensation for disability and/or medical benefits and thus does not concern, as is present in this case, counsel's ability to obtain an attorney's fee award. *See* 20 C.F.R. §§ 702.301.

[5] A determination of the actual date claimant's counsel filed formal notice of representation is necessary only if such a filing is relevant to employer's fee liability as a matter of law. *See* n.6, *infra*.

quently, as there are no questions of fact at issue with regard to the district director's attorney's fee award, those awards should have been directly appealed from the district director to the Board. *Jarrell*, 19 BRBS at 216; *Glenn*, 18 BRBS at 205. The administrative law judge's dismissal of employer's request for a hearing on the district director's award of an attorney's fee for services rendered before her in this case is therefore affirmed.

In addition, the Board lacks jurisdiction to review the merits of the district director's Compensation Orders awarding an attorney's fee as employer did not file an appeal to the Board within thirty days of the date that the district director's order on reconsideration was filed on December 24, 1996. *See* 33 U.S.C. § 921(a); 20 C.F.R. §§ 801.205, 702.350; *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997); *see also Ins. Co. of North America v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983). Although the Board's regulations provide that a notice of appeal filed with another governmental agency or subdivision of the Department of Labor shall be considered filed with the Board as of the date it was received by that entity, where it is in the interest of justice to do so, *see* 20 C.F.R. § 802.207(a)(2), employer's request for a formal hearing before an administrative law judge is not a notice of appeal to the Board. *Porter*, 31 BRBS at 112. Employer's request indicates that it sought further proceedings before the administrative law judge and not appellate review. *Id.* Accordingly, employer's effort to obtain a formal hearing in this case do not evince an intent to seek Board review of the district director's Compensation Orders.[6]

---

[6] Moreover, we note that even if we were to construe employer's request for a formal hearing as a timely notice of appeal

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Employer's Motion for Reconsideration, and the district director's Compensation Order Award of Attorney Fees, are affirmed. The district director's Compensation Order Award of Attorney Fees on Reconsideration is modified to reflect that claimant's counsel is awarded a fee of $309.50. In all other regards, the district director's Compensation Order Award of Attorney Fees on Reconsideration is affirmed.

---

filed before the Board, employer's contentions are nevertheless without merit. An attorney can be compensated for time spent even before claimant appoints him in writing. *See Grimm v. Director, OWCP*, 4 BLR 1-203 (1981); see generally *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (en banc) (Smith and Dolder, JJ. dissenting). The actual date that claimant's counsel files his notice of representation with OWCP has no bearing on the integral issue involved in awarding an attorney's fee, i.e., whether the requested fee is reasonably commensurate with the necessary work done, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132. Furthermore, inasmuch as the district director may only award an attorney's fee for work performed by counsel at that administrative level, she has already implicitly considered and rejected employer's contention that counsel is not entitled to any fee for work performed prior to the date that he filed his notice of representation. In addition, the district director explicitly concluded, in her Compensation Order Award of Attorney Fee on Reconsideration, that counsel "has explained his representation in the case." Compensation Order Award of Attorney Fee on Reconsideration dated December 24, 1996, at 1.

SO ORDERED:

/s/ BETTY JEAN HALL
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ ROY P. SMITH
ROY P. SMITH
Administrative Appeals Judge

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative Appeals Judge

APPENDIX D

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:

ROBERT CABRAL, *Claimant*, v.	Date Issued: APR 02 1997
HEALY TIBBITTS BUILDERS, INC., *Self-Insured Employer*,	
and	Case No. 95-LHC-1763 OWCP No.: 15-39103
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, *Party-In-Interest*	

ORDER

On January 29, 1997, this office issued an *Order of Dismissal* in the above-captioned matter dismissing a request for formal review of an award of attorney's fees by the District Director. The *Order* incorrectly identified the moving party as "Claimant's counsel" when, in fact, Employer, through its Corporate Risk Manager, made the request.

As the Order of Dismissal indicated, this Office does not have jurisdiction to consider the adequacy of an award of attorney's fees for services rendered before the District Director. *Mazzella v. United States Terminals*, 8 BRBS 755, *aff'd on recon.*, 9 BRBS 191 (1978); *Hawkins v. Golden Commissary*, 8 BRBS 664 (1978).

Accordingly,

IT IS ORDERED that the January 29, 1997 *Order of Dismissal* is amended to reflect that Employer, through its Corporate Risk Manager, submitted the request for reconsideration to this Office. The *Order of Dismissal* remains unchanged in all other respects.

IT IS FURTHER ORDERED that Employer's request for reconsideration is DENIED.

Entered on this date, April 2, 1997 by:

/s/ JAMES GUILL
JAMES GUILL
Associate Chief Administrative
Law Judge

APPENDIX E

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:

ROBERT CABRAL
Claimant,

v.

Case No. 95-LHC-1763
OWCP No.: 15-39103

HEALY TIBBITTS BUILDERS, INC.,
Self-Insured Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

ORDER OF DISMISSAL

The above-captioned matter was referred to this Office upon request of Claimant's counsel for, as stated by the district director, "formal review of the attorney fees approved" by her. However, the Benefits Review Board (Board) has held that assessment of an attorney's fee by the district director is a discretionary act and review of such an award is, therefore, properly sought by filing a notice of appeal with the Board as the administrative law judge has no authority to review the adequacy of a fee award for services performed before the district director. *Mazzella v. United Terminals*, 8 B.R.B.S. 755, *aff'd. on*

recon. 9 B.R.B.S. 191 (1978); *Hawkins v. Golden Commissary*, 8 B.R.B.S. 664 (1978). Accordingly,

IT IS SO ORDERED, that this matter be dismissed for lack of subject matter jurisdiction.

Entered on this date January 29, 1997, by:

/s/ JAMES GUILL
James Guill
Associate Chief Judge

APPENDIX F

U.S. DEPARTMENT OF LABOR
OFFICE OF LONGSHORE & HARBOR
WORKERS COMPENSATION
401 E. Ocean Blvd., Suite 720
Long Beach, CA 90802

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act.	: COMPENSATION ORDER : AWARD OF ATTORNEY FEES ON RECONSIDERATION
ROBERT CABRAL *Claimant*	: File No. 15-39103
HEALY TIBBITTS BUILDERS, INC. *Employer*	:
SELF INSURED EMPLOYER *Insurance Carrier*	:

Such investigation in the above entitled matter having been made as is considered necessary and no hearing considered necessary, the District Director makes the following:

FINDINGS OF FACTS

That the defendants by letter dated December 13, 1996, requested reconsideration of the Compensation

Order on Attorney Fees. The defendants object to an alleged $23.00 error in the prior order.

That Attorney Freidheim, by letter dated December 18, 1996, has agreed to reduced his fees by $23.00, as requested by the defendants. Applicant attorney has explained his representation in the case. The undersigned finds the lowering of the fees is a reasonable solution to this issue.

AWARD

Therefore, the December 6, 1996 prior Order is vacated herein and a fee in the amount of $309.00 is awarded to the Law Office of Jay Lawrence Friedheim. Said fee shall be assessed against the employer pursuant to Section 28 of the Act, 33 USC 928.

Given under my hand at
Long Beach, California this
24th day of December 1996

/s/ JOYCE L. TERRY
JOYCE L. TERRY
District Director
18th Compensation District

HPH//

APPENDIX G

U.S. DEPARTMENT OF LABOR
OFFICE OF LONGSHORE & HARBOR
WORKERS COMPENSATION
401 E. Ocean Blvd., Suite 720
Long Beach, CA 90802

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act.	: COMPENSATION ORDER : AWARD OF ATTORNEY FEES
ROBERT CABRAL *Claimant*	: File No. 15-39103
HEALY TIBBITTS BUILDERS, INC. *Employer*	:
SELF INSURED EMPLOYER *Insurance Carrier*	:

Such investigation in the above entitled matter having been made as is considered necessary and no hearing considered necessary, the District Director makes the following:

FINDING OF FACTS

That counsel for the claimant, Jay L. Friedheim, Esq. submitted an itemized fee petition for services performed at the District Director level, however, he has

reduced his fees by 50%, since he was not successful in all issues in the litigation of this matter. Additionally, he has reduced his fees by an additional $30.00 due to a miscalculation at the time of the filing.

That the counsel for the employer/carrier has submitted an objection to the applicant counsel's attorney fee petition.

That based on a review of the objections to the attorney fee petition and in order to be consistent with the Administrative Law Judge's Supplemental Decision and Order Awarding Attorney's Fees, the attorney fee award should be amended and reduced for the following reason:

That the objection that claimant's attorney's hourly rate of $150.00 and $100.00 per hour for work performed by Ed Ducey (legal assistant) are excessive, is without merit. The prevailing rate has been reviewed and is considered consistent with the ALJ's Supplemental Decision and Order Awarding Attorney's Fees dated 10/9/96. The rate of $150.00 per hour for the attorney and $100.00 per hour for Mr. Ducey is considered appropriate.

3/27/96: Employer objects to the 2.80 hours claimed by ED, for file review; as insufficient description of activity. 1 hour will be allowed for this file review one day before conference.

3/28/95: There are three entries for this date.

Mr. Ducey claims 3.40 hours to attend conference and summarize results, Employer objects to 3.40 hour as excessive since the conference lasted less than two hours. Employer further contends that a summary is unnecessary. Considering that the conference lasted less than two hours, 1.80 hours is reasonable amount of time for the conference.

Attorney Friedheim claims .40 hours as a teleconference with client re: informal conference; Employer objects to .40 hours as excessive and contends that the time should be reduced to .20 hours. .20 hours is a reasonable amount of time considering that claimant attended the conference.

Attorney Friedheim claims .40 hours in order to Draft memo re: informal conference. Employer objects to the entire entry since counsel did not attend the conference and is a duplicate entry for ED of same date. It does appear that the requested .40 hours is duplicate entry for ED on same date; this time will be disallowed.

3/30/95: Employer objects to .70 hours claimed by ED for teleconference with client re: informal conference and prior medical treatment, as a duplicate entry of 3/28/95 for claimant's counsel. .30 hours is reasonable amount of time for discussing medical treatment issues with claimant.

4/3/95: Employer objects to .7 hours for reviewing the Memorandum of Informal Conference as excessive and asserts that the time should be reduced to .30 hours. .30 hours is a reasonable amount of time for reviewing the 1 1/4 page Memorandum of Informal Conference.

4/11/95: Employer objects to the 1.20 hours claimed in order to Draft an Affidavit in support of expedited hearing, as excessive time; Affidavit consists of only $1\frac{1}{2}$ pages. .50 hours will be allowed for this entry.

4/12/96: Employer objects to .50 hours claimed in order to Draft letter to OWCP case, teleconference with client re: case. Employer contends that this entry is unintelligible and excessive time for a one page letter to OWCP. .30 hours will be allowed for one page letter to OWCP, the teleconference with client re: case appears to be a duplicate entry on the same day.

That employer's suggested reductions in hours to the fee petition, due to duplicative, excessive, and non-specific work, are reasonable and well documented. Accordingly, 1.90 of the hours claimed by Mr. Friedheim and 3.1 hours claimed by Mr. Ducey will be disallowed.

Further, Since the claimant failed to prevail in the entitlement to wage loss benefits and succeeded only in establishing "entitlement to certain relative minor medical benefits," the fees can only be awarded for work attributable to the medical care issue. Therefore, and in accordance with the ALJ Supplemental Decision and Order and the work performed at the District Director's level, one-third of the time spent on this case was devoted to obtaining medical care for the claimant.

Accordingly, Atty Friedheim's allowable time of 4.10 hours and Mr. Ducey's allowable 3.80 hours will be reduced by two-thirds. Thus the employer is liable for a total of 1.37 hours of work by Atty Friedheim and 1.27 hours of work by Mr. Ducey.

AWARD

A fee of $205.50 for Atty Friedheim and $127.00 for work performed by Mr. Ducey for a total of $332.50 is hereby approved in favor of the Law Office of Jay L. Friedheim, for necessary services rendered on behalf of the claimant. Said fee shall be assessed against the employer pursuant to Section 28 of the Act, 33 USC 928.

Given under my hand at
Long Beach, California this
6th day of December 1996

/s/ JOYCE L. TERRY
JOYCE L. TERRY
District Director
18th Compensation District

HPH//

APPENDIX H

PROCEDURE IN RESPECT OF CLAIMS

. . .

Sec. 19 (c) . . . . The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.

(d) Notwithstanding any other provisions of this act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

APPENDIX I

REVIEW OF COMPENSATION ORDER

. . .

Sec. 21(b)(1) . . . . There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this Act, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.